Syed Meir then called out to the others to come out. A short while later six males, two females and one child came out from the front door. The men were made to lie down on the road. The accused was the first to be searched, Syed Meir searched the accused in the presence of Rafik Khan. Syed Meir testified that the accused was wearing green long pants (Ex. P9). In the waist pocket Syed Meir found six .38 ammunitions, coins 75 cents and a key. There were other ammunitions found in the house after the accused was interrogated. These ammunitions were the subject matter of the second charge. I acquitted and discharged the accused on this charge on the ground that the circumstances leading to the discovery had cast some doubt that they were under the control of the accused.

Syed Meir handed the ammunitions and other exhibits to Insp. Takbir Ahmad.

Syed Meir was subjected to lengthy cross-examination especially in regard to the trousers worn by the accused to show that the green trousers did not really belong to the accused.

Under cross-examination Syed Meir stated that the six bullets were still in the trousers after he recovered the trousers from the accused. The trousers and the six bullets were subsequently handed to Insp. Takbir Ahmad. Defence counsel suggested that there was a pair of pink or red coloured trousers but Syed Meir could not recollect there was one.

When re-examined Syed Meir stated that from the time he took possession of the green trousers until he handed it to Insp. Tasbir Ahmad he had it with him.

Rafik Khan gave evidence substantiating the testimony given by Syed Meir. He confirmed that Syed Meir found six .38 bullets in a small waist pocket of the green trousers worn by the accused.

Under cross-examination Rafik Khan stated that all the pants worn by the male Chinese who were searched were recovered. He denied that all the trousers were removed before the search. Rafik Khan repeated his earlier statement that the green trousers were worn by the accused.

The accused gave his evidence on oath. He denied that the green trousers belonged to him. He maintained that he was wearing red trousers on the day in question. The accused also denied that he had the bullets in his pocket. He alleged that Syed Meir caught hold of his hair, pushed him to the ground and took off his trousers, and after feeling it threw it aside.

The accused also alleged that he was assaulted at the police station and was asked whether his trousers was among the heap of things at the corner. He pointed out to one but not the green trousers. He further alleged that Syed Meir told him he had six bullets.

When questioned by the court the accused said that he had never tried or put it on before. The accused was requested to put on the green trousers in court and I observed that it fitted the accused perfectly.

One Loh Tat Man of High Street Police Station was called as a witness for the defence. He testified that he was in the police party led by Syed Meir to No. 6 Jalan 24 Overseas Union Garden Kuala Lumpur. According to him all the six persons including the accused had their trousers on when they were taken to the police station. This conflicted with the accused's own testimony that his trousers were removed by Syed Meir.

Nonetheless having heard the whole of the evidence produced before the court I formed the view that both Syed Meir and Rafik Khan had told the court the truth and it is my finding of fact that the accused was wearing the green trousers (Ex. P9) and the six bullets were in fact found from the small waist pocket of the green trousers. I am also satisfied beyond any reasonable doubt that the ammunitions recovered from the accused's trouser pockets are amongst those bullets that have been produced before the court.

The defence story has not cast any doubt as to the prosecution case and it is my judgment that the accused did have in possession six rounds of .38 special ammunitions without lawful authority. For these reasons I convicted the accused and sentenced him to death.

Order accordingly.

Solicitors: *Khoo & Sidhu.*

E.K. SDN. BHD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[A.C.J. (Gunn Chit Tuan J.) July 12, 1977]
[Penang — Tax Appeal No. 2 of 1976]

Revenue Law — Money received in advance in accordance with terms of lease — Whether income in respect of rent — Income Tax Act, 1967, ss. 4(d) and 27(3).

The question for decision in this appeal was whether a sum of money received in advance by the appellant in the year 1973 in accordance with the terms of a lease dated February 21, 1973 entered into between the appellant as lessor and Caltex Oil Malaysia Ltd. as lessee constituted income in respect of rent within the meaning of section 4(d) of the Income Tax Act, 1967 and was therefore assessable to income tax in the year of assessment 1974 under section 27(3) of the said Act.

Held: the sum in question came within the definition of "rent" and was therefore income. It followed that under section 27 of the Income Tax Act, 1967, it was assessable to income tax, in the year of assessment 1974.

Cases referred to:-

(1) *Sharikat K.M. Bhd.* v. *Director-General of Inland Revenue* [1972] 1 M.L.J. 224, 226.
(2) *Morley* v. *Tattersall* 22 T.C. 51.
(3) *Jay's — the Jewellers Ltd.* v. *Commissioners of Inland Revenue* 29 T.C. 274.
(4) *De Nicholls* v. *Saunders,* (1870) L.R. 5 C.P. 589.

TAX APPEAL.

Tan Phock Kin for the appellant.

Bakarudin bin Sulaiman (Federal Counsel) for the respondent.

Gunn Chit Tuan J.: The sole question in this appeal by way of case stated under paragraphs 34

and 35 of Schedule 5 to the Income Tax Act, 1967, was whether a sum of money received in advance by the appellant in the year 1973 in accordance with the terms of a lease dated February 21, 1973, entered into between the appellant as lessor and Caltex Oil Malaysia Ltd. as lessee constituted income in respect of rent within the meaning of section 4(d) of the Income Tax Act, 1967, and was therefore assessable to income tax in the year of assessment 1974 under section 27(3) of the said Act.

The facts of the case are as follows. The appellant is a private limited company incorporated in Malaysia and is the owner of several pieces of land. One of those pieces of land, known as Lot Pegangan No. 34(7) P.B. 4 D.T.L. Pulau Pinang, was leased to the said lessee for a period of ten years commencing on November 16, 1972 and expiring on November 15, 1982. Under the provisions of the said lease (see pages 1-12 of Exhibit A2), the appellant was entitled to receive a sum of $120,000 being the aggregate rental in advance for the whole of the ten-year period calculated at the rate of $12,000 per annum. The lessee has entered into occupation of the said land on which it has built a filling station/service station and the appellant has received the agreed sum of $120,000 in the year 1973.

In order to understand the question raised in this appeal, it will be necessary to refer to the following clauses of the annexure to the said lease which are normally found in such types of leases and which provide that the rental paid in advance by the lessee is refundable in the circumstances referred to therein: —

"3(d) If the lessee shall fail to procure an unconditional licence to use the demised premises and the buildings erected thereon for the storage of petroleum products or for any of the other usual or other purposes of a filling station and/or service station or having procured such a licence if the same is cancelled withdrawn or not renewed unconditionally, or if it shall become otherwise unlawful or in the opinion of the Lessee impossible or impracticable to use the said land and the buildings erected thereon advantageously for any of such purpose then and in any such cases the Lessee shall have the right upon giving three (3) calendar month's notice in writing to the Lessor of its intention so to do to determine this Lease and upon the expiry of such notice this Lease shall cease and determine and the Lessor shall refund to the Lessee all rental paid in advance for any period subsequent to such date of termination.

3(e) In case the buildings or any part thereon erected or constructed upon the demised premises shall be destroyed by fire tempest earthquake or other inevitable cause the Lessee shall be at liberty by notice in writing to the Lessor of its intention so to do to terminate this Lease forthwith and upon such termination the Lessor shall forthwith refund to the Lessee all rental paid in advance for any period subsequent to such date of termination."

Out of the said sum of $120,000 received in 1973, a sum of $1,500 was one and one-half month's rental received by the appellant under the said lease for the months of November and December 1972, and a sum of $12,000 was in respect of one year's rental received for the whole of the twelve months of 1973. The balance of $106,500 was in respect of rental for future years calculated at $12,000 per year or $1,000 per month from January 1, 1974 to November 16, 1982. This balance of $106,500 was shown in the appellant's balance sheet as at December 31, 1973, as a liability under the item "Refundable deposit for rental paid in advance" (see page 20 of Exhibit A2).

On October 19, 1974, the Director-General of Inland Revenue, pursuant to section 4(d) of section 27(3) of the Income Tax Act, 1967, raised an additional assessment for the year of assessment 1974 on the appellant (see page 15 of Exhibit A2) for $54,000, which took into account the said sum of $106,500 received by the appellant in 1973 as rental in advance.

It was the contention of the appellant that the $106,500 was not assessable income for the year of assessment 1974 because it was refundable under the said clauses 3(d) and (e) of the annexure to the lease and moreover section 4(d) of the Income Tax Act, 1967, did not impose a charge on rents as such, but rather on "income in respect ... rents", rents being regarded as a source of income. Counsel for the appellant also contended that there were the following three types of rent, namely, (i) rent which was not paid in advance, (ii) rent paid in advance but not subject to refund, and (iii) rents paid in advance, but subject to refund. According to counsel's contention, the definition of rent in the Income Tax Act, 1967, did not include the third category above. With respect, I could not agree with such an artificial interpretation as it is clear that section 4 of the Income Tax Act, 1967, provides that rents are one of the classes of income on which tax is chargeable and the definition of "rent" in section 2 of the said Act is not exhaustive in that the legislature has clearly indicated that rent "*includes*" (emphasis is mine) any sum paid for the use or occupation of any premises or part thereof or for the hire of any thing". The definition is extensive and is meant to include all types or categories of payments for the use or occupation of any premises or for the hire of anything, that is, whether they were paid in advance or in arrear or whether they are subject to refund or otherwise. The sum of $106,500 was clearly rent received in 1973 by the appellant, *albeit* rent in advance and subject to refund under certain circumstances. As it was rent received in 1973, it was therefore income under section 4 of the said Act and under section 27(1) and (3) of the said Act it was therefore assessable to income tax in the year of assessment 1974.

Counsel for the appellant also argued that it had no absolute control or right to do what it liked with the money because it was under an obligation to refund the rental on the happening of any of the contingencies contemplated in the said clauses of the lease. That contention too was, in my opinion, of no merit as it was obvious that the beneficial ownership of the money had on receipt passed to the appellant and it could utilize it in any manner whatsoever. It was however conceded before me that if the court was of the opinion that the sum in question was covered by the definition of "rent", then section 27(3) of the Income Tax Act, 1967, applied. Subsections (1) and (3) of section 27 of the said Act which provide for the basis period to which gross income in respect of interest, discount, rent, etc. is related read as follows: —

"27. (1) Subject to this section where gross income from a source in Malaysia of the relevant person —

(a) consists of any interest, discount, rent or royalty or of any pension, annuity or other periodical payment to which section 4(e) applies; and

(b) first becomes receivable in the relevant period,

it shall when it has been received be treated as gross income of the relevant person for the relevant period.

(3) Where gross income mentioned in subsection (1)(a) becomes receivable in the relevant period and is in respect of —

(a) a period which commences after the end of the relevant period; or

(b) a period which overlaps the relevant period and which partly elapsed after the end of the relevant period,

subsection (2) shall not apply and that gross income shall when received be treated as gross income of the relevant person for the relevant period."

The expressions "the relevant person" and "the relevant period" are explained in section 22(1) of the said Act which is as follows: —

"22. (1) Subject to this Act, the gross income of a person from a source of his for the basis period for a year of assessment shall be the gross income from that source for that period ascertained in accordance with the following provisions of this Chapter (the person and that period being referred to in those provisions as the relevant person and the relevant period respectively)."

I agreed with counsel for the appellant that if the sum of money in question was rent, then the above-mentioned subsections of section 27 of the Income Tax Act, 1967, applied, as the legislature, in my opinion, had deliberately used the words "first becomes receivable" in section 27(1)(b) of the said Act so as to avoid arguments, which have arisen under some other tax legislation, as to the nature of certain receipts such as rents and as to when such receipts were assessable to income tax.

The case of *Sharikat K.M. Bhd.* v. *Director-General of Inland Revenue*[1] was cited by counsel who argued that it was distinguishable from the present case. In that case it was held *inter alia* that a sum of $2,500 received by the appellant company from its tenant in respect of the tenancy of one of the company's shop-houses was income assessable to tax. The said sum of $2,500 was treated as premium but it was argued that even if the said sum was treated as premium it was premium for a period of ten years so that if it attracted tax, such tax should be spread over a period of ten years. Alternatively, it was suggested that the condition that the payment of $2,500 was refundable meant that the sum paid did not crystallize into a premium until the expiry of ten years. Those arguments were rejected by Gill F.J. (as he then was), and whilst it is true that the above-quoted case was concerned with premium and not with rent, yet in this connection it would be appropriate to repeat here the following words of His Lordship when he said as follows:

"The fact that the company may have to refund this amount in the event of termination of the tenancy before the expiry of the period of ten years is beside the point. It may well be that in the event of the appellant company having to return this sum of $2,500 it may become entitled to a refund of the tax paid. But it is not for this court to go into the question of what may happen in the future. So long as the premium has been received by the company, it is liable to income tax under section 4(d) of the Act, so that the special commissioners were right in making their deciding order to that effect."

I would respectfully agree with the above dictum of His Lordship above and in this case I am of the opinion that if the appellant had to refund any portion of the said $106,500 in future, the tax paid could be remitted in part under the provisions of section 129(1)(b) of the Income Tax Act, 1967.

Various English and Australian authorities were also referred to, but with respect to counsel I do not think it is necessary to refer to all of them as the facts in each of them are different. In the English case of *Morley* v. *Tattersall*,[2] balances of purchase-money remaining unclaimed in the hands of a firm of auctioneers were held, on being distributed among the partners after a lapse of years, not to have become trading receipts in respect of which the firm was assessable to income tax. But in the later case of *Jay's — the Jewellers Ltd.* v. *Commissioners of Inland Revenue*,[3] an unclaimed surplus on the sale of pledges by a company which carried on business as jewellers and pawnbrokers (where statutory limitations apply) was held to have become a trading receipt when the limitation expired, and not till then. The case of *De Nicholls* v. *Saunders*[4] was quoted by counsel to support the appellant's argument that the sum in question was in the nature of a loan. But in this case there was no evidence to show or from which to infer that the sum in question was in fact a loan, and moreover the said case was not one decided under the relevant English tax statute. As for the Australian cases quoted, because of differences between the Australian and Malaysian systems of income tax law no substantial assistance in the present case can be gained from those cases. Be that as it may, the provisions of section 27(1) and (3) of our Income Tax Act, 1967, are to my mind clear and they apply if the sum of $106,500 came within the definition of "rent" in the said Act. As I have, as stated above, held that the sum in question came within the definition of "rent" and was therefore income, it followed that under section 27 of our Income Tax Act, 1967, it was assessable to income tax in the year of assessment 1974. In the result I am of the opinion that the Special Commissioners of Income Tax were correct in their decision as contained in their Deciding Order of July 2, 1976. That being so, the appeal therefore failed and must be dismissed with costs.

Appeal dismissed.

Solicitors: *Thillaimuthu & Phock Kin.*